(12)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision 16 of 2007

Ashok Kumar Bhalla

Vs.

Satish Kumar Bhalla and another

Post for Order: 11 .05.2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

(122)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Civil Revision No.16 of 2007

Applicant
Defendant No.1

Ashok Kumar Bhalla, S/o Late Jashwant Singh Bhalla, aged about 50 years, R/o Gondpara, Tahsil & District Bilaspur (C.G.)

versus

Respondents
Plaintiffs

1. Satish Kumar Bhalla, S/o Late Jashwant Singh Bhalla, Aged about 60 years, Presently residing at Behind Kshatriya Hardware Ratanpur, Tahsil Kota, Distt. Bilaspur (C.G.)

2. Smt. Tripta Rani, W/o Surya Kumar Bharwesh, Aged about 52 years, R/o Mandir Chowk, Jarhabhata, Bilaspur (C.G.)

REVISION UNDER SECTION 115 CIVIL PROCEDURE CODE

Present :
Shri Gautam Bhaduri, counsel for the applicant.
Shri Vivek Shrivastava, counsel for the respondent No.1

ORAL ORDER

(Passed on this 11th day of May, 2007)

The validity of the order dated 19.01.2007 in Civil Suit No. 2A of 2006 by 2nd Additional District Judge, Bilaspur, is under challenge in this Civil Revision.

2. Admittedly, applicant – Ashok Kumar Bhalla and respondent No.1 – Satish Kumar Bhalla are brothers. Respondent No.2 is their sister and is married.

3. Applicant – Ashok Kumar Bhalla had filed a Civil Suit No.40-A of 2004 before the 5th Additional District Judge, Bilaspur, for declaration of title and permanent injunction against the respondents herein on the basis of the execution of an unregistered Will dated 21.02.1996 by his mother Smt. Shakuntala Rani relating to the suit house situated in Gondpara. The respondents herein resisted the suit on the ground that Smt. Shakuntala Rani had executed a registered Will on 11.02.1997 whereunder parties were the joint owners and in possession of the suit house. The respondents, however, remained absent on the date of hearing and were proceeded *ex parte*. An *ex parte* judgment and decree was passed in favour of the applicant herein for declaration of title and permanent injunction on the basis of execution of Will dated 01.12.1996 by Smt. Shakuntala Rani.

4. The respondent No.1 herein filed an application under Order 9 Rule 13 C.P.C. for setting aside the *ex parte* judgment and decree dated 7.4.2005 passed in Civil Suit No. 40A of 2004 on the ground of sudden demise of his counsel and also on the ground that the Civl Suit was transferred to the Court of 5th Additional District Judge, Bilaspur and on 4.1.2005 the transferee Court had ordered issuance of notice to the defendant/respondent No.1 herein on submission of process form which order was not complied with and as a result notice was not issued to the respondent No.1. The application under Order 9 Rule 13 C.P.C. was pending on the date of the impugned order.

5. It is stated in the petition for revision that in the year 2004 the non-applicant No.1 had filed a Civil Suit No.2A of 2006 claiming partition and possession of 1/3rd share in the suit house on the basis of a registered Will dated 11.02.1997 executed by Smt. Shakuntala Rani. The applicant herein filed an application on 20.12.2006 before the 2nd Additional District Judge, Bilaspur in Civil Suit No. 2A of 2006 for dismissal of suit on the ground that in an earlier Civil Suit No. 40A of 2004 between the same parties and relating to the same subject matter, an *ex parte* decree had been passed on 7.4.2005 in favour of the applicant, and therefore, under Section 11 C.P.C., the subsequent suit was barred on the principle of *res judicata*.

6. The learned lower Court rejected the application dated 20.12.2006 filed by the applicant herein solely on the ground that since an application under Order 9 Rule 13 C.P.C. for setting aside the *ex parte* judgment and decree dated 7.4.2005 passed in Civil Suit No. 40A of 2004 was pending, the judgment and decree passed in Civil Suit No. 40A of 2004 would not operate as *res judicata* in the subsequent suit.

7. Section 11 of C.P.C. reads as under:

> **11. *Res Judicata.*---** No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

8. The words "heard and finally decided by such Court under Section 11 C.P.C." are of considerable importance. A suit is said to be heard and finally decided when the judgment rendered by the Court is not the subject matter of any appeal because once the appeal is filed, the decision loses its character of finality and what was once *res judicata* becomes *res subjudice*, i.e., the matter is under judicial process. The reason behind it appears to be that in an appeal any finding arrived at by the Court could be varied by the Appellate Court, and therefore, it would be idle to contain that the decision had become final. Applying the same analogy where the judgment and decree was passed *ex parte* against the defendant and the defendant had moved an application under Order 9 Rule 13 of the C.P.C. for setting aside the judgment and decree, it could not be said that judgment and decree had become final because if the application under Order 9 Rule 13 of the C.P.C. was allowed, the judgment and decree would be liable to be set aside.

9. In this view of the matter, the rejection of the application dated 20.12.2006 by the learned lower Court on the ground that an application under Order 9 Rule 13 of the C.P.C. for setting aside the *ex parte* judgment and decree dated 7.4.2005 passed in Civil Suit No.40-A of 2004 was pending, and therefore, such judgment and decree would not operate as *res judicata* in the subsequent suit, could not be questioned. The proper course for the applicant/defendant herein in such a situation would have been to file an application under Section 10 C.P.C. for stay of subsequent suit till decision of the application under Order 9 Rule 13 C.P.C. for restoration of the earlier suit.

10. The words "No Court shall try any suit or issue in which the matter directly and substantially in issue....." clearly indicate that the question of *res judicata* can be determined in a suit only when it is in issue. Trial of a suit commences only after issues are framed. An issue on the applicability of Section 11 C.P.C. is a *sine qua non* before the question raised by the defendant could be decided. Copy of the application filed by the applicant herein on 20.12.2006 shows that it was filed before framing of issues in the suit. The applicant herein having raised the question of *res judicata* in the written statement filed by him, the lower Court ought to have framed an issue on the question of *res judicata* and to adjudicate the same thereafter.

11. During the course of arguments, it was also not disputed by the learned counsel for the parties that after the impugned order the application under Order 9 Rule 13 C.P.C. for setting aside the *ex parte* judgment and decree dated 7.4.2005 passed in Civil Suit No. 40A of 2004 had also been dismissed. In that view of the matter, it would be appropriate to direct the learned 2nd Additional District Judge, Bilaspur to frame an issue in the suit on the question of *res judicata* and to decide the issue of the applicability of Section 11 C.P.C. on merits, after giving an opportunity of hearing to the parties to the suit. Ordered accordingly.

11. Civil Revision being devoid of any merit is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge